INDEX

CITATIONS

561-116—74——1

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-70

LEWIS H. GOLDFARB AND RUTH S. GOLDFARB,
PETITIONERS

v.

VIRGINIA STATE BAR AND FAIRFAX COUNTY BAR ASSOCIATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

QUESTIONS PRESENTED

1. Whether a minimum fixed fee schedule promulgated by a county bar association is exempt from the Sherman Act's prohibition against price fixing on the ground that the restraint on competition is among the members of a "learned profession."

2. Whether interstate commerce is affected by collectively-fixed fees for attorneys' services in connection with the purchase of real estate in Northern Virginia.

3. Whether the Virginia State Bar is exempt from liability under the Sherman Act for its role in the

establishment and enforcement of minimum fee schedules under the "state action" doctrine of *Parker* v. *Brown*, 317 U.S. 341

4. Whether the Eleventh Amendment immunizes the State Bar from suit in a federal court.

INTEREST OF THE UNITED STATES

Responding to evidence that prices for personal services were increasing more rapidly than the rate of inflation in the rest of the economy, more than four years ago the United States initiated a concerted program of antitrust enforcement directed at the "commercial" aspects of various professions (including attorneys) and other providers of personal services.[1] This program has included widely-disseminated statements of the Antitrust Division's policies, followed by litigation challenging particular anticompetitive fee-setting practices of various professions. The government has challenged minimum fixed fee schedules of professional associations of engineers, architects, accountants and realtors as illegal price fixing.[2] Earlier this year the government filed a simi-

[1] See, *e.g.*, McLaren, *Antitrust—The Year Past and The Year Ahead*, 1970 N.Y. State Bar Ass'n Antitrust L. Symp. 15, 23 McLaren, *Interview*, 39 Antitrust L.J. 368, 377 (1970); Hearings before the Subcommittee on Representation of Citizen Interests of the Senate Committee on the Judiciary, on Legal Fees, 93d Cong., 1st Sess., pt. I, pp. 164–185.

[2] *E.g.*, *United States* v. *Prince Georges County Bd. of Realtors*, Civ. No. 21545 (D. Md.), terminated by consent decree on December 28, 1970; *United States* v. *American Soc'y of Civil Eng'rs*, Civ. No. 72 C 1776 (S.D.N.Y.), terminated by consent decree on June 1, 1972; *United States* v. *American Institute of Architects*, Civ. No. 992–72 (D.D.C.), terminated by consent decree on June 19, 1972; *United States* v. *American Institute*

lar action challenging a bar association's minimum fee schedule.[3]

Despite the government's enforcement efforts,[4] bar association minimum fixed fee schedules, a fairly recent development,[5] are still widespread; they have been used in as many as 34 states (Pet. App. A 20). The decision of the court of appeals that such schedules do not violate Section 1 of the Sherman Act, if left standing, will diminish the incentive for state and local bar organizations to reconsider their maintenance of such schedules; other professions also may conclude that they, too, are under no legal compulsion to eliminate these means of fixing prices.

The interest of the United States in this case is underscored by the President's recent announcement of his economic program, in which he referred to the

---

of Certified Public Accountants, Inc., Civ. No. 1091–72 (D. D.C.), terminated by consent decree on July 6, 1972; *United States.* v. *National Soc'y of Professional Eng'rs*, Civ. No. 2412–72 (D.D.C.), pending after trial.

[3] *United States* v. *Oregon State Bar*, No. 74–362 (D. Ore.), filed May 9, 1974, pending on defendant's motion for summary judgment, raising the "learned profession" and "state action" claims discussed *infra*, pp. 5–8, 9–10, but not the "commerce" issue (see pp. 8–9, *infra*).

[4] The American Bar Association, which in 1961 endorsed minimum fee schedules by concluding that the habitual charging of fees less than those established by such a schedule may be evidence of unethical conduct (Opinion No. 302, Committee on Professional Ethics and Grievances), stated in 1970 that "[m]ere failure to follow a minimum fee schedule, even when habitual, cannot, standing alone and absent evidence of misconduct, afford a basis for disciplinary action" (Opinion No. 323, Committee on Ethics and Professional Responsibility).

[5] See Branca, *Bar Association Fee Schedules and Suggested Alternatives: Reflections on a Sherman Act Exemption That Doesn't Exist*, 3 U.C.L.A.-Alaska L. Rev. 207, 208 (1974).

need for enforcement of the antitrust laws with respect to "noncompetitive professional fee schedules and real estate settlement fees * * *." 120 Cong. Rec. H10120, H10121 (daily ed., October 8, 1974).

STATEMENT

Petitioners filed a class action against respondents Virginia State Bar and Fairfax County Bar Association alleging that respondents' adoption and enforcement of a minimum fixed fee schedule for attorneys constituted price fixing and restraint of trade and commerce, in violation of Section 1 of the Sherman Act. Petitioners claimed to represent a class consisting of all persons who, as petitioners did, had purchased homes in Reston, Virginia, during the four years preceding the filing of the complaint and who had been charged title examination fees by attorneys in accordance with that schedule. Petitioners sought damages, a declaratory judgment and an injunction.

The district court severed the issue of damages and, after trial of liability, held that the Association's adoption and use of the schedules violated the Sherman Act. It dismissed the case against the State Bar on the ground that its challenged activities (unlike the Association's) were covered by the implied exemption from the Act for "state action" recognized in *Parker* v. *Brown*, 317 U.S. 341 (Pet. App. A; 355 F. Supp. 491).

The court of appeals affirmed as to the State Bar but reversed as to the Association, Judge Craven dissenting in part (Pet. App. B; 497 F. 2d 1). The court held that the setting of minimum fees by attorneys

was covered by an implied exemption from the Sherman Act for "learned professions," and that the Association's activities with respect to the fee schedule involved "local service" that did not affect interstate commerce. The court agreed with the district court that the State Bar was immune under *Parker* v. *Brown*.

Judge Craven would have affirmed the dismissal of the State Bar on the ground that its involvement in promulgating and maintaining the fee schedules was too insubstantial to render it liable for violation of the Act. He concluded, however, that there is no exemption from the Sherman Act for "learned professions," and that the activities of the Association with respect to the fee schedule sufficiently affected commerce to be within the Sherman Act.

DISCUSSION

1. The principal question in this case—whether the Sherman Act applies to minimum fee schedules promulgated and maintained by bar associations—is an important issue under the antitrust laws that this Court has not decided but should resolve. As the dissenting opinion of Judge Craven in the court of appeals demonstrates, the rationale of a long line of decisions applying the Sherman Act to the provision of various personal services indicates that the commercial aspects of the practice of law are not exempt from the prohibitions of Section 1 of the Sherman Act against unreasonable restraints of trade.

The importance of the issue is manifest. The types of legal services to which minimum fee schedules nor-

mally apply—real estate transactions, drafting of legal instruments, divorce proceedings, probate work, *etc.*—affect a large number of people. Although the total charges for those services cannot be estimated, they obviously amount to many millions of dollars. Lawyers, bar associations and clients should know whether the antitrust laws bar such fixing of minimum fees.

This Court has never held that there is an implied exemption from the Sherman Act for the learned professions. It specifically found it unnecessary to decide in *American Medical Association* v. *United States,* 317 U.S. 519, 528, "whether a physician's practice of his profession constitutes trade under § 3 of the Sherman Act," and in *United States* v. *National Association of Real Estate Boards,* 339 U.S. 485, 491–492, declined to "intimate an opinion" on whether the "professions" constitute "trade" under the Sherman Act. The reasoning of this Court's decisions applying the Sherman Act in a variety of contexts, however, indicates that it does cover the fixing of fees for legal services by bar associations—the most commercial aspect of law practice.

The words "restraint of trade" in the Sherman Act broadly cover "[t]he fixing of prices and other unreasonable restraints" not only with respect to goods but with respect to services, including personal services. *Id.* at 491, and cases there cited. There is no sound reason why the pricing of legal services, like the pricing of other personal services, should not also be subject to the Sherman Act's prohibition of unreasonable restraints of trade.

As this Court recently recognized, "[w]e live in a society where the distribution of legal assistance, like the distribution of all goods and services, is generally regulated by the dynamics of private enterprise." *Fuller* v. *Oregon,* No. 73–5280, decided May 20, 1974, slip op. p. 13. Insofar as compensated services are concerned, the lawyer has been described as "a self-employed business man." Patterson & Cheatham, *The Profession of Law* 263 (1971).*

Application of the Sherman Act to the fee-setting practices of the legal profession will not, as the court of appeals feared, weaken standards for admission to the bar and undermine the ethical standards of the profession. The only question is whether the antitrust laws apply to the most commercial aspects of legal practice—the fixing of minimum fees. Whatever may be the appropriateness of modifying traditional criteria in applying the Sherman Act to a profession

* The cases upon which the court of appeals relied in holding that there is an implied exemption from the Sherman Act for the learned professions do not support that conclusion. The statement in *Federal Baseball Club of Baltimore, Inc.* v. *National League*, 259 U.S. 200, 209, that "personal effort, not related to production, is not a subject of commerce," is no longer viable in view of the discrediting of the holding in that case that professional baseball is not commerce under the Sherman Act—a holding this Court characterized as an "aberration" which has survived only because of *stare decisis*. *Flood* v. *Kuhn*, 407 U.S. 258, 282. Similarly, Justice Story's 1834 dictum in *The Nymph*, 18 Fed. Cases 506, 507 (C.C. D.Me.), distinguishing between a trade that "is carried on for the purpose of profit, or gain, or livelihood" and "the liberal arts or the learned professions," provides no meaningful guideline for determining today whether the Sherman Act covers the commercial aspects of the practice of law.

(see *United States* v. *Oregon State Medical Soc'y*, 343 U.S. 326, 336), there is no occasion to do so when dealing with the fixing of the charges its members impose for their services.

2. The court of appeals also erred in concluding that the fee fixing involved merely a "local service" that did not affect interstate commerce.

The district court's findings establish that the application of minimum fixed fee schedules to real estate transactions in northern Virginia had a substantial effect on interstate commerce. The court found that "a significant portion of funds furnished for the purchasing of homes in Fairfax County comes from without the State of Virginia" (Pet. App. A 4); that almost half of the recorded Fairfax County deeds of trust of under $100,000 that identify the location of the mortgagee show the mortgagee to be located outside the state (*id.* at A 7); that almost all lenders making mortgage loans require title insurance and a title examination (*id.* at A 4); and that these facts showed that respondents' minimum fixed fee schedule for title examinations and for the preparation of title insurance papers by attorneys in Virginia substantially affected interstate commerce (*ibid.*). In addition, the court found that a substantial percentage of Fairfax County residents work outside of Virginia (*ibid.*), that a significant amount of loans on Fairfax County real estate are guaranteed by government agencies with headquarters in the District of Columbia (*ibid.*), and that more than 31 percent of the persons who lived in Fairfax County in 1970 had lived outside of Virginia in 1965 (*id.* at A 6).

This Court has repeatedly recognized that the Sherman Act applies to local activities that substantially affect interstate commerce. See, *e.g.*, *Burke* v. *Ford*, 389 U.S. 320, 321; *United States* v. *Employing Plasterers Ass'n*, 347 U.S. 186, 189; *United States* v. *Women's Sportwear Mfrs. Ass'n*, 336 U.S. 460, 464; *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219, 234. The district court's findings, which the court of appeals did not reject, show that the fee fixing by the local bar association had a significant impact upon interstate commerce and, under this Court's decisions, is therefore subject to Section 1 of the Sherman Act. In addition, since few out-of-state lenders are likely to finance real estate transactions in Fairfax without availing themselves of the safeguards provided there by the services of an attorney, those services play an integral role in the interstate financing of such transactions.

3. Finally, the court of appeals erred in concluding that the actions of the State Bar in proposing minimum fixed fee schedules and threatening to enforce them were within the implied exemption from the Sherman Act for "state action" recognized in *Parker* v. *Brown*, *supra*, 317 U.S. at 350–352 (Pet. App. B4–B12). Under that doctrine, restraints of trade do not violate the Sherman Act where they derive their "authority and * * * efficacy from the legislative command of the state" (317 U.S. at 350), involve activities of a state or its officers or agents "directed by its legislature" (*id.* at 350–351), and are adopted, approved and enforced by the state or a state agency.

Id. at 352. Accord, *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 706–707.

The fee schedules here were not required by any legislative command of the state, and were not adopted, specifically approved, or directly enforced by the Supreme Court of Virginia, the only arguably relevant state agency.[7] The fact, which the court of appeals apparently held to be dispositive, that the state court has a general statutory duty to supervise the State Bar in prescribing and enforcing the court's code of ethics for attorneys, is not enough to bring the State Bar within the "state action" exemption. The theory of the "state action" exemption is that action taken pursuant to governmental direction is not intended to be prohibited by the Sherman Act. For the principle to apply, however, the state must be more than peripherally involved. See, *e.g.*, *George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.*, 424 F. 2d 25, 30 (C.A. 1), certiorari denied, 400 U.S. 850; *Hecht* v. *Pro-Football, Inc.*, 444 F. 2d 931, 935 (C.A.D.C.), certiorari denied, 404 U.S. 1047. The Supreme Court of Virigina is not directly enough involved in the promulgation and maintenance of the

[7] Under Virginia law the State Bar is an association composed of the attorneys of the State (Va. Code 54–49); its officers must be active practitioners, most of whom practice privately; and it is controlled by a Council of elected and appointed attorneys (Pet. App. B 11). Accordingly, the court of appeals correctly recognized (Pet App. B 11) that the State Bar itself, consisting of those subject to regulation, had insufficient independence to be regarded as a state agency under the "state action" doctrine. See *Asherville Tobacco Bd. of Trade, Inc.* v. *Federal Trade Commission*, 263 F. 2d 502, 508–510 (C.A. 4); cf. *Gibson* v. *Berryhill*, 411 U.S. 564, 578–579.

local association's minimum fee schedules to bring the State Bar within the "state action" exemption of *Parker* v. *Brown.*

Since the State Bar is not the *alter ego* of the State of Virginia, nor a state agency in any relevant sense (see p. 10, *supra,* n. 7), a judgment against the State Bar, even for money damages, would not be equivalent to a judgment against the state.[8] Accordingly, the Eleventh Amendment does not immunize the State Bar from suit against it in the federal courts. See generally *Edelman* v. *Jordan,* 415 U.S. 651.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
THOMAS E. KAUPER,
Assistant Attorney General.
GERALD P. NORTON,
Assistant to the Solicitor General.
HOWARD E. SHAPIRO,
Attorney.

OCTOBER 1974.

[8] A State Bar Fund, derived from fees from members of the State Bar, is maintained only for use by the State Bar. Va. Code 54–52.

U.S. GOVERNMENT PRINTING OFFICE: 1974